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No.

In The

Supreme Court Of The United States

October Term, 1992

IN THE MATTER OF THE GRANDPARENTAL VISITATION OF C.G.F.:
T.F. AND D.L.,

Petitioners,

v.

H.F. and F.F.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the Wisconsin Supreme Court's interpretation of state law, recognizing and granting visitation rights to the grandparents of the child in question, unduly burden the substantive due process rights of the natural mother, and the adoptive father, who had married and formed an intact family unit and who objected to such visitation, in the absence of any evidence of harm to the child if visitation was denied, or of unfitness of the parents?

II.

Were the natural mother and adoptive father denied equal protection where state law subjected them both to grandparent visitation proceedings because the natural father was dead, since married couples consisting of two natural parents or consisting of a natural parent and an adoptive parent, where a natural parent is not dead, are not subject to such grandparent visitation claims?

LIST OF PARTIES

The parties to the state court proceedings were Petitioners, T.F. and D.L., the natural mother and adoptive father who were living together in a legal marital relationship as custodians of C.G.F., the minor child in question, and Respondents, H.F. and F.F., the grandparents of C.G.F.

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OPINIONS BELOW

The trial court below entered an unpublished order on November 14, 1990, a copy of which is attached hereto as Appendix C, providing provisional visitation rights for grandparents, H.F. and F.F., and providing further that, in the event of the adoption of the child by D.L., the visitation order would become moot and have no force or effect.

On July 3, 1991, the Wisconsin Court of Appeals, in an unpublished decision, a copy of which is attached hereto as Appendix B, affirmed the trial court's order.

The Supreme Court for the State of Wisconsin subsequently granted discretionary review of the grandparents' approval and on May 7, 1992 rendered its published decision,

In re Grandparental Visitation of C.G.F., 483 N.W.2d 803 (Wis. 1992), reversing the court of appeals and the trial court.

The Supreme Court of Wisconsin denied Petitioner's Motion for Reconsideration on June 23, 1992, a copy of which is attached hereto as Appendix A.

JURISDICTION

The final judgment of the Wisconsin Supreme Court was entered on May 7, 1992. Petitioners T.F. and D.L. filed a Motion for Reconsideration as to the constitutional issues in the case that had been raised in briefing and oral argument for the Wisconsin Supreme Court, but which were not specifically addressed in the court's decision. The Motion for Reconsideration was denied on June 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

U.S. CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

U.S. Constitution, Amendment XIV:

> ...[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wis. Stat. § 880.155 (West Supp. 1990) Visitation by grandparents:

> If one or both parents of a minor child is deceased and the minor is in the custody of the surviving parent or any other person, any grandparent of the minor child may petition for visitation privileges with respect to the minor, whether or not the person with custody is married. The court may grant reasonable visitation privileges to a grandparent if the court determines that it is in the best interest and welfare of the child, may

issue any necessary order to enforce the same, and may, from time to time modify such privileges or orders upon a showing of good cause.

STATEMENT OF THE CASE

In the beginning, there existed an intact family unit comprised of a husband, wife and child. On January 15, 1988, the husband died and the child continued to reside with the wife. The grandparents of the child, parents of the deceased husband, continued to visit the child. Relations between the wife and the grandparents grew increasingly strained and their visitation of the child was halted. The wife later remarried on September 6, 1990. The stepfather commenced proceedings to legally adopt the child and in the interim, the grandparents petitioned for visitation rights to the child pursuant to Wis. Stat. Ann. § 880.155 (West Supp.1990).

An evidentiary hearing was held on October 9, 1990. The trial court found that it was in the child's best interests to have visitation with the grandparents. However, it further ordered that, if the adoption proceeded and was ordered by the court, the visitation order would become moot and have no force or effect.

The grandparents appealed the contingent termination provision of the visitation order. The court of appeals affirmed the trial court order.

The Wisconsin Supreme Court granted discretionary review, and on May 7, 1992 reversed the court of appeals and the trial court. The court found that grandparent visitation could be ordered over the parents' objections.

SUMMARY OF ARGUMENT

The decision of the Wisconsin Supreme Court denies the substantive due process rights of parents as guaranteed by the Fourteenth Amendment by holding that grandparents of a child have visitation privileges over the objections of the parents

where there is no provable harm to the child in the absence of visitation and no proof of unfitness of the parents.

The proliferation of state third party visitation statutes has created a menagarie of conflicting rights with no coherent jurisprudence. Each state has passed statutes granting visitation rights to grandparents with their grandchildren in at least some circumstances. These visitation statutes create or encourage a relationship between grandparents and grandchildren. Yet, state adoption statutes, on the other hand, terminate that relationship. Conflict is inevitable. Because state courts have held and more than likely will continue to hold, in favor of visitation rights, the due process rights and equal protection rights of parents have been, and thus will continue to be, violated.

The state statute, as applied, which draws a distinction between the parental rights of a wife and stepfather where the natural father of a child has died and where the natural father's relationship was terminated by judicial proceeding, violates the Equal Protection rights of the parents since such categorization is not a legitimate or compelling government objective.

ARGUMENT

I. THE GRANTING OF GRANDPARENT VISITATION PRIVILEGES OVER THE OBJECTIONS OF PARENTS, WHERE THERE IS NO PROVABLE HARM TO THE CHILD IN THE ABSENCE OF SUCH VISITATION AND NO PROOF OF UNFITNESS OF PARENTS, UNCONSTITUTIONALLY VIOLATES THE FUNDAMENTAL DUE PROCESS RIGHTS OF PARENTS.

In *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), this Court upheld a unitary family's custody of its child as against claimed liberty interests of foster families. The foster parents had claimed that the psychological tie between a child and its parents created a

"psychological family" which needed to be given constitutional recognition. *Id.* at 839. In ruling against the foster families, this Court stated that "biological relationships [were] not the exclusive determination of the existence of the family," *id.* at 843, but that liberty rights of the family exist only in the "intrinsic human rights . . . as they have been understood in this Nation's history and tradition." *Id.* at 845.

These "intrinsic human rights" have been recognized to include the right of individuals to marry, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), as marriage is the basic foundation of the family in our society, *Smith*, 431 U.S. at 843. Since marriage is not a matter of blood relation, but a civil contract, it has been perceived as the "purest tie of social life," *Maynard v. Hill*, 125 U.S. 190, 212 (1887), whose freedoms are fundamental. *See Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Here, the second marriage of the wife to the adoptive father inures the same fundamental freedoms as any marriage. Indeed, in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), this Court upheld as constitutional a presumption of legitimacy for a child born in marriage even as against the natural father. *Id.* at 118-130.

Concomitant to the fundamental freedom of marriage is the liberty interest that provides the right of parents to "establish a home and bring up their children" according to the dictates of their own conscience. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). In fact, this Court has stated, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . [a]nd it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter," *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), absent clear and present danger to the children. *Id. See also Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

In this case, the parents had exercised their fundamental right to marriage and were subsequently raising their child.

Their objections to grandparent visitation should be honored because they flow from the fundamental rights to marry and raise children. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Wisconsin Supreme Court has decided that "the statute allows the Trial Court, in the best interest of the child, to order grandparental visitation in direct opposition to the wishes of the custodian regardless of who the custodian is." *In re Grandparental Visitation of C.G.F.*, 483 N.W.2d 803, 806 (Wis. 1992). The Wisconsin Supreme Court's application of the visitation statute and subsequent forced visitation seriously undermines the fundamental rights of the parents.

While the State may proscribe the conditions under which the marriage relation may be created, *Pennoyer v. Neff*, 95 U.S. 714, 735-36 (1877), the contours of a marital relation are established by history and tradition. *Smith*, 431 U.S. at 845. Mandating grandparent visitation over parents' objections elevates third party rights to the level of the fundamental rights of parents in the upbringing of their children. This violates the traditional social structure and the recognized fundamental rights of parents. *See generally Wisconsin v. Yoder*, 406 U.S. 205 (1972). In addition, allowing a trial court to define the contours of the basic characteristics of familial relationships on an ad-hoc basis takes away the right of families to order their social lives. The "best interest of the child" cannot be held to justify intrusion into family life absent proof of unfitness. *See Smith*, 431 U.S. at 862-63 (1977) (Stewart, J., concurring).

Although the privilege of adoption is a creature of the state, the purpose of this privilege is to create an intact family. The family is more than just a statutory creation, it is a unit traditionally and legally recognized and protected. The fundamental right of parents to raise their children as they see fit is an essential element to the intact family.

Similarly, the right to visitation is also a creature of the state. But unlike adoption statutes, visitation statutes do not

create a fundamental right. Nonetheless, some states are beginning to recognize grandparent visitation rights to the detriment of constitutionally protected due process interests of parents.

Several states have addressed the issue of whether grandparent visitation unconstitutionally interferes with parents' rights. *Lehrer v. Davis*, 571 A.2d 691, 695 (Conn. 1990) (Concluding "the custodial rights of an intact family do not automatically preclude the visitation rights of grandparents" but the constitutional validity of the visitation statute was "not ripe for adjudication" in this case because of factual inadequacy.); *Sketo v. Brown*, 559 So.2d 381, 382 (Fla. Dist. Ct. App. 1990) (Grandparent visitation statute not facially unconstitutional; state has a compelling interest in the welfare of children and may find visitation to be in the best interest of child notwithstanding natural mother's objection based on Fourteenth Amendment right to raise child "as she sees fit"); *Smith v. Finstad*, 277 S.E.2d 736 (Ga. 1981) (Held grandparent visitation statute as applied to natural mother and stepfather was not unconstitutional); *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992) (Upheld constitutionality of grandparent visitation statute recognizing that the statute "seeks to balance the fundamental rights of the parents, grandparents and the child"); *Bailey v. Menzie*, 542 N.E.2d 1015, 1020 (Ind. Ct. App. 1989) (Statute permitting grandparent visitation after adoption of child by a stepparent is constitutional because it "interferes with a parent's liberty interests only to observe its duty under the *parens patriae* doctrine and only upon a finding that it would be in the best interest of the child"); *Hollingsworth v. Hollingsworth*, 516 N.E.2d 1250, 1253 (Ohio Ct. App. 1986) (Third party visitation statute "is a constitutional statutory means by which the state asserts a compelling governmental interest"); *But cf. In re Marriage of Herreras*, 768 P.2d 673, 674 (Ariz. Ct. App. 1989) (Provision of grandparent visitation statute that automatically terminated visitation rights upon adoption does not violate due process because grandparents' interests are statutory, not fun-

damental); *Cox v. Stayton*, 619 S.W.2d 617, 620-21 (Ark. 1981) (Adoption statutes do not unconstitutionally deprive grandparents of their rights to grandchildren without due process because grandparents have no constitutionally protected rights to be deprived of in regards to their grandchildren); *Ward v. Ward*, 537 A.2d 1063, 1068-69 (Del. Fam. Ct. 1987) (Amendment to grandparent visitation statute restraining visitation when both parents, natural or adoptive, are cohabitating as husband and wife, is constitutional because grandparents have a liberty interest only when the grandparent-grandchild relationship is custodial).

Although this Court has recognized "extended family" rights as against the state, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), these rights have not been recognized as against the fundamental rights of parents. Research has indicated that the "extended family of several generations, with all its relatives" really never existed on "any grand scale in America," with only six percent of households in America containing grandparents, parents, and children. Francis L.K. Hsu, *Roots of the American Family: From Noah to Now, in Kin and Communities: Families in America* 219, 225 (Allan J. Lichtman et al. eds., 1979). The "extended family" was never the "American family." Although relationships between grandparents and grandchildren facilitated by visitation rights are important and in many situations are very beneficial, the fundamental rights of parents as established by the Constitution should not be abridged when the two are in direct conflict.

II. STATE LAWS RECOGNIZING GRANDPARENT VISITATION RIGHTS THROUGHOUT THE UNITED STATES ARE SHARPLY DIVIDED AS TO THE EFFECT OF ADOPTION ON SUCH RIGHTS AND ALSO ON THE NATURE OF THE CONSTITUTIONAL INTERESTS OF NON-CUSTODIAL GRANDPARENTS WHEN THEY CONFLICT WITH THE FUNDAMENTAL RIGHTS OF PARENTS.

While all states have enacted laws recognizing grandparent visitation rights, they are sharply divided not only on the effect of adoption on such rights, but also on the nature of the constitutional interests, if any, of non-custodial grandparents when they conflict with the fundamental rights of parents.

At common law, grandparents had no legal right to visitation with their grandchildren. *Succession of Reiss*, 15 So. 151, 152 (La. 1894) ("[T]he obligation ordinarily to visit grandparents is moral, and not legal.").

These rights exist today solely by statutory enactment. Each of the fifty states has passed a statute granting grandparents visitation in at least some circumstances. Ala. Code § 30-3-4 (1975); Alaska Stat. § 25.24.150 (1991); Ariz. Rev. Stat. Ann. § 25-337.01 (1991); Ark. Code Ann. § 9-13-103 (Michie 1991); Cal. Civ. Code § 4351.5 (West Supp. 1992); Colo. Rev. Stat. § 19-1-117 (Supp. 1991); Conn. Gen. Stat. Ann. § 46b-57 (West 1986); Del. Code Ann. tit. 10, § 950(7) (Supp. 1990); Fla. Stat. Ann. § 61.13(2)(b)(2)(c) (West Supp. 1991); Ga. Code Ann. § 19-7-3 (Michie 1991); Haw. Rev. Stat § 571-46(7) (Supp. 1991); Idaho Code § 32-1008 (1983); Ill. Ann. Stat. ch. 40, para. 607(b) (Smith-Hurd Supp. 1992); Ind. Code Ann. § 31-1-11.7-2 (Burns Supp. 1992); Iowa Code Ann. § 598.35 (West Supp. 1992); Kan. Stat. Ann. § 60-1616(b) (Supp. 1991); Ky. Rev. Stat. Ann. § 405.021 (Michie/Bobbs-Merrill 1984); La. Rev. Stat. Ann. § 9:572 (West 1991); Me. Rev. Stat. Ann. tit. 19, §

752 (West 1991); Md. Fam. Law Code Ann. § 9-102 (1991); Mass Gen. Laws Ann. ch. 119, § 39D (West Supp. 1992); Mich. Comp. Laws Ann. § 722.27(b) (West Supp. 1992); Minn. Stat. Ann. § 257.022 (West Supp. 1992); Miss. Code Ann. § 93-16-3 (Supp. 1991); Mo. Ann. Stat. § 452.402 (Vernon Supp. 1992); Mont. Code Ann. § 40-9-102 (1992); Neb. Rev. Stat. § 43-1802 (1988); Nev. Rev. Stat. Ann. §§ 125A.330, 125A.340 (Michie Supp. 1991); N.H. Rev. Stat. Ann. § 458:17-d (Supp. 1992); N.J. Stat. Ann. § 9:2-7.1 (West Supp. 1992); N.M. Stat. Ann. §§ 40-9-2, 40-9-3 (Michie 1989); N.Y. Dom. Rel. Law § 72 (McKinney Supp. 1992); N.C. Gen. Stat. § 50-13.2 (1987); N.D. Cent. Code § 14-09-05.1 (1991); Ohio Rev. Code Ann. § 3109.11 (Anderson Supp. 1991); Okla. Stat. Ann. tit. 10, § 5 (West Supp. 1992); Or. Rev. Stat. § 109.121(1)(a) (1990); 23 Pa. Cons. Stat. Ann. §§ 5311-5312 (1991); R.I. Gen. Laws § 15-5-24.1 - 24.3 (1988); S.C. Code Ann. § 20-7-420(33) (Law. Co-op. 1976); S.D. Codified Laws Ann. §§ 25-4-52 - 25-4-54 (1984); Tenn. Code Ann. § 36-6-301 (1991); Tex. Fam. Code Ann. § 14.03(e) (West Supp. 1992); Utah Code Ann. § 30-5-2 (1989); Vt. Stat. Ann. tit. 15, § 1011(a) (1989); Va. Code Ann. § 20-107.2 (Michie Supp. 1992); Wash. Rev. Code Ann. § 26.09.240 (West Supp. 1992); W.Va. Code §§ 48-2B-1 - 48-2B-7 (Supp. 1992); Wis. Stat. Ann. § 767.245 (1981 & West Supp. 1990); Wyo. Stat. § 20-7-101 (Supp. 1991).

Of the fifty state statutes that grant grandparent visitation rights, twenty-eight are silent on the effect of adoption on grandparent visitation. (The twenty-eight include: Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Kansas, Kentucky, Maine, Maryland, Michigan, Mississippi, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Rhode Island, South Carolina, Utah, Virginia, Washington, West Virginia, Wisconsin). State courts are left to resolve conflicts between state adoption statutes that terminate all relationships between an adopted child and his relatives and third party visitation statutes that grant visitation rights to rela-

tives, i.e., grandparents. Statutes may grant specific visitation rights to relatives while others terminate all legal relationships between an adopted child and his relatives.

State appellate courts, left to resolve this conflict, have reached disparate conclusions. Their decisions can be grouped into four categories: three conflicting and one hybrid. *See* Patricia Wendlandt, Comment, *Grandparent Visitation Statutes: Remaining Problems and the Need for Uniformity*, 67 Marq. L. Rev. 730, 750-52 (1984).

First category: State courts hold that adoption principles prevail over visitation statutes. Adoption terminates a child's legal relationship with his natural relatives and therefore natural grandparents are no longer the child's legal grandparents and lack standing to petition for visitation. *In re Marriage of Herreras*, 768 P.2d 673, 674 (Ariz. Ct. App. 1989); *Wilson v. Wallace*, 622 S.W.2d 164, 165 (Ark. 1981); *Campbell v. Holcomb*, 388 S.E.2d 65, 66-67 (Ga. Ct. App. 1989); *Browning v. Tarwater*, 524 P.2d 1135, 1139 (Kan. 1974); *Smith v. Trosclair*, 321 So.2d 514, 515-16 (La. 1975); *Bikos v. Nobliski*, 276 N.W.2d 541, 544 (Mich. Ct. App. 1979); *Aegerter v. Thompson*, 610 S.W.2d 308, 310 (Mo. Ct. App. 1980); *Mickey v. Beinhauer*, 786 P.2d 1317, 1318 (Or. Ct. App. 1990). Since the adoption statute prevails over the grandparent visitation statute no evaluation of the best interests of the child is required. Termination is strict.

Second category: State courts hold that grandparent visitation statutes prevail over adoption statutes when the adoption is by a stepparent or relative. *Loftin v. Smith*, 590 So.2d 323, 326 (Ala. Civ. App. 1991); *Reeves v. Bailey*, 126 Cal. Rptr. 51, 54 (Cal. Ct. App. 1975); *In re Marriage of Davisson*, 797 P.2d 809, 810 (Colo. Ct. App. 1990); *In Interest of R.C.E.*, 535 So.2d 673, 673-74 (Fla. Dist. Ct. App. 1988); *Lingwall v. Hoener*, 483 N.E.2d 512, 516 (Ill. 1985); *In re Visitation of Groleau*, 585 N.E.2d 726, 727-28 (Ind. Ct. App. 1992); *Patterson v. Keleher*,

365 N.W.2d 22, 25-26 (Iowa 1985); *Hicks v. Enlow*, 764 S.W.2d 68, 72 (Ky. 1989); *Howell v. Rogers*, 551 So.2d 904, 905-06 (Miss. 1989); *In re Visitation of Kanvick v. Reilly*, 760 P.2d 743, 746 (Mont. 1988); *Preston v. Mercieri*, 573 A.2d 128, 134 (N.H. 1990); *Pillars v. Thompson*, 712 P.2d 1366, 1367-68 (N.M. 1986); *Hollingsworth v. Hollingsworth*, 516 N.E.2d 1250, 1254-55 (Ohio Ct. App. 1986); *Suroviec v. Mitchell*, 500 A.2d 894, 896 (Pa. Super. Ct. 1985); *Chavis v. Witt*, 328 S.E.2d 74, 75 (S.C. 1985); *In re Petition of Nearhoof*, 359 S.E.2d 587, 589, 591 (W. Va. 1987). Under this category, an evaluation of the best interests of the child is required.

Third category: State courts draw a distinction between adoption by a stepparent and adoption by "strangers" or a "new family." In many of these cases, the overriding policies of making a child more adoptable by severing ties to his biological family and preserving the unity of the new family prevail. *In re W.E.G.*, 710 P.2d 410 (Alaska 1985) (Grandparent visitation statute precludes post-adoption visitation by grandparents); *Mitchell v. Erdmier*, 320 S.E.2d 163, 164 (Ga. 1984) ("[N]o rights of visitation by former grandparents exist."); *In re A.C.*, 428 N.W.2d 297, 302 (Iowa 1988) ("The facts . . . demonstrate the wisdom . . . of not imposing grandparent visitation upon adoptive parents in other than stepparent adoptions. The number of prospective adoptive parents for [the child] would be significantly reduced because of the court-imposed grandparent visitation."); *L.F.M. v. Dep't of Social Services*, 507 A.2d 1151, 1154 (Md. Ct. Spec. App. 1986) ("We do not question the sincerity or the depth of the affection that [grandparents] feel for their grandchildren. That affection, however, simply does not translate into a constitutionally protected liberty interest."); *Faust v. Messinger*, 497 A.2d 1351, 1353-54 (Pa. Super. Ct. 1985) ("It is our opinion that adoptive or natural parents should have the right to select the persons with whom their child will associate as long as they properly perform their duties to the child. To take this right away from proper parents would not be

for the best interest of the child."): *Mitchell v. Doe*, 706 P.2d 1100, 1103 (Wash. Ct. App. 1985) ("[U]nder Washington law, [the grandmother] is now a stranger to [the grandchild]. . . . When an adoption has become final, previous ties to natural parents are completely severed and a wholly new relationship is created."); *In re Adoption of R.D.S.*, 787 P.2d 968, 969 (Wyo. 1990) (Grandparent has no visitation rights even though grandmother "has been a primary caretaker"of the child prior to the adoption, had spent Easter, Thanksgiving and Christmas holidays with the child and [adoptive parents] had promised maternal grandmother "she would always be able to see" the child.). However, in other cases, states continue to allow interference, even with intact families. *Johnson v. Fallon*, 181 Cal. Rptr. 414, 418-19 (Cal. Ct. App. 1982) (In the case of a stranger adoption, the court stated, "[a]ny determination of the merits of granting visitation . . . is to be based upon a weighing of the dual considerations of whether doing so is in the best interests of the child and would not unduly hinder the adoptive relationship."); *O'Brien v. Shepley*, 451 So.2d 82, 84-85 (La. Ct. App. 1984) (Court allowed grandparent visitation because it interpreted the spirit of the grandparent visitation statute to allow grandparent visitation not only when one parent had died but when both had died and child had subsequently been adopted.); *New York ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049, 1052 (N.Y. Ct. App. 1981) ("The State, in its role as *parens patriae*, has determined that, under certain circumstances, grandparents should have continuing contacts with the child's development if it is in the child's best interest. . . . Having created the adoptive relationship, the State should be allowed to determine to what extent the child's contacts with its natural family will be ended.").

Fourth category (hybrid): These State courts have stated that if grandparents have court-ordered visitation rights, they cannot be deprived of these rights without due process. Grandparents are therefore constitutionally entitled to receive notice of an adoption proceeding. *Brown v. Meekins*, 643

S.W.2d 553, 554 (Ark. 1982) ("[G]randparents who have court ordered visitation rights . . . are constitutionally entitled to receive notice of an adoption proceeding."); *In re Grandparental Visitation of C.G.F.*, 483 N.W.2d 803, 806-07 (Wis. 1992) ("Once the grandparents . . . were ordered visitation rights with their minor grandchild, they should not have been deprived of those rights without due process."). States that fall within the first or second category may also fall within the fourth hybrid category if they view court-ordered visitation rights as worthy of due process protection.

The universality of grandparent visitation statutes and deeply divided state law treatment of conflicts between the liberty interests of parents and the interests of non-custodial grandparents makes this case particularly appropriate for review by this Court. Failure to review and resolve this issue will foster confusion over the constitutional landscape of parents' rights and will permit a significant degree of conflict within families. Such a result will, ironically, have a devastating effect on the lives of children, the very group sought to be benefitted by the state statutes in question.

III. THE WISCONSIN STATUTE, AS APPLIED, VIOLATES THE EQUAL PROTECTION CLAUSE AS IT CREATES A DISTINCTION, BETWEEN THE PARENTAL RIGHTS OF AN ADOPTIVE PARENT OF A CHILD WHOSE NATURAL FATHER HAS DIED AND AN ADOPTIVE PARENT OF A CHILD WHOSE NATURAL FATHER'S PARENTAL RIGHTS WERE TERMINATED BY JUDICIAL PROCEEDING, THAT SERVES NO COMPELLING GOVERNMENT INTEREST.

In subordinating the fundamental rights of parents to grandparent visitation privileges the Wisconsin Supreme Court has unconstitutionally endorsed distinctions between a child

whose adoption was preceded by the death of his biological father and a child whose adoption was preceded by termination of a biological father's relationship through judicial proceedings in construing the fundamental rights of parents as against grandparent visitation privileges in this case. Such distinctions are irrelevant to any legitimate government objectives.

In the opinion below, the Wisconsin Supreme Court, in granting grandparent visitation rights, in effect refused to recognize that adoptive parents could have parental rights equal to those of natural parents. *In re Grandparental Visitation of C.G.F.*, 483 N.W.2d 803, 806 (Wis. 1992). Though the Court noted that the holding was "an exception that is available only to a very limited class of persons, those children whose natural parent has died and who, subsequently have been adopted by a step-parent," *id.*, such an "undifferentiated distinction", *Caban v. Mohammed*, 441 U.S. 380, 394 (1979), poses a significant infringement on understood parental rights.

The State of Wisconsin asserted its interest in establishing an economic relationship between the child and the biological grandparents, *In re Grandparental Visitation of C.G.F.*, 483 N.W.2d 803, 806 (Wis. 1992), under its probate code, but that interest fails in the context of visitation statutes which involve the fundamental rights of parents. By distinguishing the rights of adoptive parents of a child whose adoption was preceded by the death of a natural parent in regard to visitation, the state makes a distinction that does not bear a substantial relationship to the state's asserted economic interest.

Under equal protection jurisprudence, the state "may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lehr v. Robertson*, 463 U.S. 248, 265 (1983).

The State of Wisconsin has not identified an interest sufficient to support its differential treatment of an adoptive parent of a child whose natural parent has died and an adoptive parent

of a child whose natural parent's parental rights have been terminated by judicial proceedings. For these reasons, the Wisconsin Supreme Court's interpretation of Wisconsin law violates the Equal Protection rights of the parents in question.

CONCLUSION

For the reasons and authorities cited, this Petition for a Writ of Certiorari should be granted. This Court should review the issues of whether Petitioners were unconstitutionally deprived of their substantive due process rights and unconstitutionally denied equal protection of the laws.

Respectfully submitted,

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The Court today announced an order in your case as follows:

District 4
F.,H. v. F.,T., 91-0293-FT

Motion for Reconsideration denied, with $50.00 costs.

Marilyn L. Graves
Clerk of Supreme Court

Court of Appeals
Decision
Dated and Released

July 3, 1991

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

Notice

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 91-0293-FT

State of Wisconsin

Filed July 3, 1991
Clerk of Court of Appeals of Wisconsin

In Court of Appeals
District IV

In the Matter of the Grandparental Visitation of C.G.F.:

H.F. and F.F.,

Appellants,

v.

T.F. and D.L.

Respondents.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J. and Sundby, J.

PER CURIAM. H.F. and F.F. (the grandparents) appeal[1] from an order granting them visitation rights with C.F. (the child) but providing that their visitation rights would automatically terminate upon adoption of C.F. by her stepfather. The sole issue is whether the trial court could award visitation rights to the grandparents under sec. 880.155, Stats., notwithstanding the child's adoption by the stepfather. We conclude that, once the adoption is finalized, the trial court lacks power to award the grandparents visitation rights under sec. 880.155. Consequently, we affirm.

The facts are undisputed. The grandparent's son was the child's biological father. He died January 15, 1988. The child continued to reside with her mother, T.F., and the grandparents continued to have visitation with the child.

The mother married the stepfather on September 6, 1990. He commenced proceedings to adopt the child. The grandparents petitioned for visitation rights under sec. 880.155, Stats., which provides,

> If one or both parents of a minor child is deceased and the minor is in the custody of the surviving parent or any other person, any grandparent of the minor may petition for visitation privileges with respect to the minor, whether or not the person with custody is married. The court may grant reasonable visitation privileges to a grandparent if the court determines that it is in the best interests and welfare of the child, may issue any necessary order to enforce the same, and may from time to time modify such privileges or orders upon a showing of good cause.

---

[1]This appeal is decided pursuant to the expedited appeal procedure, Rule 809.17, Stats.

The trial court found that it would be in the child's best interest to have visitation with the grandparents. However, it further ordered that, if the adoption proceeds and is ordered by the court, the visitation order shall become moot and have no force or effect.

The grandparents contend that the court can grant then visitation rights under sec. 880.155, Stats., notwithstanding the fact that an adoption has occurred. They argue that sec. 880.155 is an exception to sec. 48.92(1) and (2), Stats., which provides,

> (1) After the order of adoption is entered the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent thereafter exists between the adopted person and the adoptive parents. –
>
> (2) After the order of adoption is entered the relationship of parent and child between the adopted person and his birth parents, unless the birth parent is the spouse of the adoptive parent, shall be completely altered and all the rights, duties and other legal consequences of the relationship shall cease to exist.

The relationship between the two statutes is a question of statutory construction that we decide without deference to the trial court's decision. *Van Cleve v. Hemminger*, 141 Wis.2d 543, 545, 415, N.W.2d 571, 572 (Ct. App. 1987).

In re Soergel, 154 Wis.2d 564, 453 N.W.2d 624 (1990), addressed the question whether the paternal grandparents of a child could obtain visitation rights under sec. 757.245(4), Stats. (1985-86) after the parents of the child have divorced, the biological father's paternal rights were terminated, and the child was adopted by the biological mother's new husband. The court concluded that the adoption severed all rights of the adopted child's birth family to the child. *Id.* at 573-74, 453 N.W.2d at 627. Allowing the grandparents to have visitation rights under

sec. 767.245(4) "would be at odds with the adoption statute's purpose of severing all rights of [the biological father] and his family to the child." *Id.* at 574, 453 N.W.2d at 627-28

The court reasoned that, under sec. 48.92(1), Stats., the second husband's adoption of the child established a status between him and the child identical to that which exists between a natural parent and his or her child. One of the rights parents have is to determine whether a relationship with grandparents is contrary to the child's best interests. Thus the court concluded it was for the parents (mother and adoptive father), not the court, to decide whether the grandparents would have visitation. *Id.*, 453 N.W.2d at 628.

We reach the same conclusion here, although we express the same regret that the statute requires this result as was expressed in the concurring opinion in *Soergel. Id.* at 575, 453 N.W.2d at 628. Section 48.92(1) and (2), Stats., severs all rights of the adopted child's birth family to the child upon the child's adoption. Adoption, in effect, terminates the grandparents' status as grandparents. Once that status no longer exists, the right to petition for visitation under sec. 880.155, Stats., also ceases to exist. After adoption, the stepfather and mother possess all of the rights of the child's natural parents, including the right to determine whether a relationship with the grandparents is in the child's best interest. Further, once the stepfather adopts the child, neither of her "parents" are deceased, and the statute on it face does not apply.

By the Court. — Order affirmed.

This opinion will not be published. *See* Rule 809.23(1)(b)5, Stats.

State of Wisconsin, Sauk County
CIRCUIT COURT
Branch 2

In the Matter of the Grandparental
Visitation of: C.G.F. d/o/b/: 12/31/85
Case No. 90GN051

ORDER

The above matter came on for hearing on the 9th day of October, 1990, Petitioner, H. and F. F appearing in proper person and by counsel Douglas W. Kammer, Respondent T. L. appearing in proper person and by counsel Barbara A. Hughes, and Mark Reitz appearing as Guardian ad Litem for the minor child, C. F. and based upon the evidence then presented, and based upon the file and proceedings herein:

I HEREBY FIND that it is in the best interest of the minor child, C.G.F. born December 31, 1985, that she have visitation with her paternal grandparents, the petitioners herein.

IT IS HEREBY ORDERED:

1. That the grandparents shall visitation one weekend every three months from Friday evening to Sunday evening upon affording the respondent one week's notice, provided however, that consideration shall be given to pre-existing plans of the respondent and her family. That the first such visitation shall be in the month of November, 1990, PROVIDED, HOWEVER, that the visitation shall be shortened for the first two visits, from 9:00 a.m. to 6:00 p.m., and of only one day duration.

2. That the grandparents shall also have reasonable telephone contact with the child, meaning one call during reasonable hours of reasonable duration every other week, to be initiated by the petitioners.

3. That as to the visitation set forth above, the petitioners shall afford all the transportation required for the visitation.

4. That notwithstanding the foregoing, none of the visitation shall be exercised over weekends containing a major holiday.

5. That in the event the pending adoption does not proceed on Monday, October 15, 1990, the respondent shall provide the petitioners with her residential telephone number in order that telephone contact can be facilitated.

6. That any letters sent by the paternal grandparents to the child shall be delivered to the child, and the child shall be allowed to write back to the grandparents without interference.

7. That the foregoing provisions set forth in paragraphs 1 through 6 shall continue in force until the pending adoption of C.G.F. by her stepfather, D.J.L. is ordered by the Court. In the event said adoption proceeds and is ordered by the Court, this order shall become moot and have no force or effect. The fact that this Order becomes moot does not change the prior Finding of Fact by the Court that such visitation is in the best interest of the child, however, the completion of the adoption proceedings vests with the parents the determination relating to grandparent visitation.

8. The apppointment of the Guardian ad Litem shall continue until the adoption of the child by her stepfather, D.J.L. is ordered by the Court.

9. The grandparents shall have until December 15, 1990, to seek review of this Order and if no such review is sought, the Order shall become final.

Dated this 14 day of November, 1990.

BY THE COURT:

James Evenson
Circuit Judge

Copies to: Barbara Hughes
Douglas Kammer
Mark Reitz

92-232

No.

Supreme Court, U.S.
FILED
AUG 26 1992
OFFICE OF THE CLERK

In The

Supreme Court Of The United States

October Term, 1992

In the Matter of the Grandparental Visitation of C.G.F.:
T.F. and D.L.,

Petitioners,

v.

H.F. and F.F.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI
SUPPLEMENTAL APPENDIX

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No. 91-0293

In the Matter of the Grandparental Visitation of C.G.F.:
H.F. and F.F.,

Appellants,

v.

T.F. and D.L.,

Respondents.

SUPREME COURT OF WISCONSIN

168 Wis. 2d 62; 483 N.W.2d 803; 1992 Wisc. LEXIS 199

March 23, 1992, Oral Argument
May 7, 1992, Filed

NOTICE

[1] THIS OPINION IS SUBJECT TO FURTHER EDITING

REVIEW of a decision of the Court of Appeals. *Reversed.*

Before STEINMETZ, ABRAHAMSON

STEINMETZ, J. The issue in this case is whether a trial court can award visitation rights to grandparents under sec. 880.155, Stats., notwithstanding the child's adoption by a step-parent.[1] The circuit court for Sauk county, Honorable James

[1] Section 880.155, Stats., provides follows:

880.155 Visitation by grandparents. If one or both parents of a minor child is deceased and the minor is in the custody of the surviving parent or any other person, any grandparent of the minor may petition for visitation privileges with respect to the minor, whether or not the person with custody is married. The court may grant reasonable visitation privileges to a grandparent if the court determines that it is in the best interests and welfare of the child, may issue any necessary order to enforce the same, and may from time to time modify such privileges or orders upon a showing of good cause.

Evenson, judge, concluded that it was in the best interest of the minor child to have visitation with her paternal grandparents. The court included a provision, however, which stated that the order would have no force or effect in the event the child's stepfather adopted her.

[2]

Following the adoption of the child, the grandparents appealed the contingent termination provision created by the circuit court's order. In an unpublished opinion, the court of appeals affirmed the circuit court's decision. The appellate court reasoned that "after adoption, the stepfather and the mother possess all of the rights of the child's natural parents, including the right to determine whether a relationship with the grandparents is in the child's best interest." We disagree with the court of appeals and reverse its decision. We hold in favor of the grandparents' cause and disregard the contingency provision in the circuit court's order.

The application of a statute to a particular set of facts is a question of law which this court reviews without deference to a lower court's determination. *State ex rel. Stedman v. Rohner*, 149 Wis. 2d 146, 150, 438 N.W.2d 585 (1989).

The facts are as follows. The biological father of minor child C.G.F. died on January 15, 1988. The deceased father was the son of H.F. and F.F., who are the grandparents and appellants in this case. The child continued to live with her mother, T.F., after her father died, **[3]** and the grandparents were allowed to visit their granddaughter on a regular basis. However, the number of times the grandparents were permitted to see their grandchild gradually decreased until ultimately, they were not allowed to see their grandchild at all. The mother remarried on September 6, 1990, and the child's stepfather, D.L., commenced adoption proceedings shortly thereafter.

The grandparents petitioned the circuit court for grandparent visitation pursuant to sec. 880.155, Stats. An evidentiary hearing was held on October 9, 1990.[2] The court entered a detailed order setting forth the grandparents' visitation rights. The court included a contingency provision in the order stating that if the stepparent's adoption of the child was granted, the court's grandparent visitation order would be of no force or effect. Judge Evenson reasoned: "The completion of the adoption proceedings vests with the parents the determination relating to grandparent visitation." The judge noted, however, that even if the order becomes moot due to adoption, it "does not change the prior Finding of Fact by the Court that such visitation is in the best interest of the child."

[4]

The court of appeals relied on *In re Marriage of Soergel*, 154 Wis. 2d 564, 453 N.W.2d 624 (1990) in upholding the trial court's decision. In *Soergel*, the biological parents divorced and the father voluntarily terminated his parental rights to his minor child. The mother remarried and her new husband adopted the minor child. The grandparents were not permitted to see their grandchild after the biological father terminated his parental rights and the stepfather adopted the child.

The grandparents in *Soergel* petitioned for visitation pursuant to sec. 767.245(4), Stats. (1985-86). The circuit court denied the grandparents visitation. After granting certification, this court upheld the circuit court's decision.

After reviewing the Wisconsin legislative history concerning visitation and adoption law, the court concluded that it was not the intent of the legislature to allow visitation under the circumstances found in *Soergel*. Reading sec. 767.245 with sec. 48.92(1) and (2), it said: "Adoption thus has the effect of

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[2] At the time of the hearing, the stepfather had petitioned for adoption of the minor child but the adoption had not yet been finalized.

severing all rights of the adopted child's birth family to the child," and, therefore, to allow the grandparents to have visitation **[5]** rights with their grandchild "would be at odds with the adoption statute's purpose of severing all rights of [the natural father] and his family." *Id.* at 573-74. Furthermore, we reasoned that the stepfather's adoption of the minor child "established a status between himself and the child that is identical to the status that exists between a natural parent and his or her child." *Id.* at 574. The court therefore concluded that the stepfather and the biological mother had the right to decide whether it is in the best interest of the child to see his/her grandparents.

In the present case, the court of appeals arrived at its holding by applying similar reasoning. It held that: "Section 48.92(1) and (2), Stats., severs all rights of the adopted child's birth family to the child upon the child's adoption" and, as a result, "adoption, in effect, terminates the grandparents' status as grandparents."

We conclude that the court of appeals incorrectly relied on *Soergel* and therefore reverse the court of appeals decision. There are important factual distinctions between the present case and *Soergel* rendering the logical **[6]** underpinnings of *Soergel* inapplicable to this case which are set forth below.

First, we find a clear distinction between the father's termination of parental rights in the *Soergel* case and the severing of the father's rights in the present case. In *Soergel*, the child's natural father willfully terminated his parental rights by going through a legal process. In the present case, the father's death severed his rights. Wisconsin law defines parent as "either a biological parent . . . or a parent by adoption. . . ." *See* 48.02(13). Moreover, it is recognized that "'parent' does not include any person whose parental rights have been terminated." *Id.* The father who terminated his parental rights in *Soergel* is no longer legally considered a parent. In contrast, despite the fact the

father in the present case is dead, he nevertheless falls within the definition of a parent. Since the deceased father continues to be considered a parent, we find his parents should continue to be considered grandparents.

A second differentiating factor between *Soergel* and the present case is that the grandparents in *Soergel* petitioned for visitation pursuant to sec. 767.245(4), **[7]** Stats. The grandparents in the present case, on the other hand, petitioned for visitation pursuant to sec. 880.155. Section 880.155 is a very narrow statute which affords visitation to only a limited class of persons, *i.e.*, grandparents of a child whose parent is deceased. It is further limited by a requirement that visitation be granted only if the court determines that visitation is in the best interest of the child. In contrast, under the statute applied in *Soergel*, ch. 767, visitation rights are afforded to grandparents, great-grandparents, stepparents, or others who have had a relationship similar to a parent-child relationship with the minor child.[3] We find the holding in *Soergel* was limited to grandparent petitions made pursuant to ch. 767 and cannot be applied to petitions made pursuant to sec. 880.155.

[8]

Another important distinction between *Soergel* and the present case is that the *Soergel* majority relied heavily on *Estate of Topel*, 32 Wis. 2d 223, 145 N.W.2d 162 (1966), as support for the proposition that adoption completely terminates the relationship between an adopted child and his birth parents' family. In *Topel* the court concluded that sec. 48.92(1) and (2), Stats., prevented children from inheriting via intestate succession from the grandfather's estate.

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[3] Chapter 767 deals with actions affecting the family, including affirming marriages, annulments, divorce, legal separation, custody, child support, maintenance payments, property division, modification of judgments affecting the family, periodic family support payments, physical placement or visitation rights to children, and paternity. See sec. 767.02, Stats.

> There is no exception in the present statute to this complete substitution of adoptive relationship for the natural relationship. We think the intent of sec. 48.92, Stats., from its language is to effect upon adoption a complete substitution of rights, duties, and other legal consequences of the natural relation of child and parent and kin with those same rights, duties, and legal consequences between the adopted person and the adoptive parents and kin.

Topel, 32 Wis. 2d at 227.

Since the *Topel* decision, the legislature has evidenced an intent to maintain ties between a child adopted by a stepparent and the child's biological grandparents **[9]** by creating an exception to secs. 48.92(1) and (2), Stats., through the enactment of sec. 48.92(3).[4] When reading the latter in conjunction with sec. 851.51, sec. 48.92(3) allows intestate inheritance rights to exist between a child and his birth parent's family after the birth parent's death and the child's subsequent stepparent adoption.[5]

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[4] Sec. 48.92(1), (2) and (3), Stats., provides as follows:

> 48.92 Effect of adoption. (1) After the order of adoption is entered the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent thereafter exists between the adopted person and the adoptive parents.
>
> (2) After the order of adoption is entered the relationship of parent and child between the adopted person and his birth parents, unless the birth parent is the spouse of the adoptive parent, shall be completely altered and all the rights, duties and other legal consequences of the relationship shall cease to exist.
>
> (3) Rights of inheritance by, from and through an adopted child are governed by sec. 851.51.

[5] When the legislature enacts a statute, it is presumed to act with the full knowledge of existing statutes. *Wood v. American Fam. Mut. Ins. Co.*, 148 Wis. 2d 639, 436 N.W.2d 594 (1989). It must be assumed then that the legislature did not intend to create a conflict, but rather to create an exception to sec. 48.92.

Pursuant to sec. 851.51, a child can inherit by intestate succession through both the birth parents' family and the adoptive parent's family. That section creates rights not just for the child but also for the biological grandparents. In pertinent part, it states: "The child is treated as the child of the deceased natural parent . . . for purposes of any statute conferring rights upon . . . relatives of that parent under the law of intestate succession or wills." Sec. 851.51(2)(b). Not only could the grandchild in this case inherit from the grandparents, but they could inherit theoretically, via intestate succession, from her. Thus, sec. 851.51 creates an exception to sec. 48.92 which allows an economic relationship to continue between an adoptive stepchild and his or her birth grandparents. This is an exception that is available only **[10]** to a very limited class of persons, those children whose natural parent has died and who subsequently have been adopted by a stepparent.[6] The grandchild in the present case falls within this class.

[11]

Today the *Topel* decision is controlling only in cases involving adoptions subsequent to a termination of parental rights. It offers no analytical guidance in those cases involving adoption after the death of a natural parent. Because *Soergel* relied on *Topel*, it is neither controlling nor properly interpretative of legislative intent where grandparents seek visitation pursuant to sec. 880.155, Stats.

A trial court's authority to grant grandparent visitation pursuant to sec. 880.155, Stats., continues even after subsequent adoption. The statute allows the **[12]** trial court, in the best

[6] This court also finds the plain meaning of sec. 880.155, Stats., creates an exception to secs. 48.92(1) and (2). There is no need to resort to statutory interpretation or an analysis of legislative intent if a statute is clear on its face. *Rice v. City of Oshkosh*, 148 Wis. 2d 78, 435 N.W.2d 252 (1989). The statutes under chapter 48 are broader statutes purporting to apply to all adoptions. They were in existence in their current form at the time that the legislature implemented sec. 880.155.

interest of the child, to order grandparental visitation in direct opposition to the wishes of the custodian regardless of who the custodian is. To hold that an adoptive parent has rights to override the provisions of sec. 880.155 would be to apply an exception to the statute that does not exist. To judicially impose such an exception would create rights for an adoptive parent superior to those that exist for a natural parent. Once the grandparents in this case were ordered visitation rights with their minor grandchild, they should not have been deprived of those rights without due process. Because sec. 880.155, Stats., allows grandparent visitation to continue subsequent to adoption of the child, we reverse the decision of the court of appeals.

By the Court. — The decision of the court of appeals is reversed.

CHIEF JUSTICE HEFFERNAN did not participate.

SHIRLEY S. ABRAHAMSON, J. (concurring). I write separately because I believe that the majority opinion in this case is inconsistent with *In re Marriage of Soergel*, 154 Wis. 2d 564, 574, 453 N.W.2d 624 (1990), the court's most recent decision concerning **[13]** grandparents' visitation rights after adoption of the child. While I believe that this case implicitly overrules *Soergel*, I would expressly overrule *Soergel*.

Just two years ago, interpreting secs. 48.92 and 767.245(4), Stats. 1985-86,[1] this court wrote that adoption "has the effect of severing all rights of the adopted child's birth family to the child," in effect terminating the biological grandparents' status as grandparents. Permitting the grandparents visitation rights would, wrote the court, "be at odds" with this purpose of the adoption statute, sec. 48.92 (1)(2).[2] The court further wrote that

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[1] Sec. 767.245(4), Stats. 1985-86, has been amended and is now set forth in sec. 767.245(1), Stats. 1989-90. The provision remains essentially the same for purposes of this case.

[2] Secs. 48.92(1) (2), Stats. 1989-90, prior to the enactment of 1991 Wis. Act 191, completely supported the holding of Soergel:

the relationship between the adoptive parent and the child is identical to that between a natural parent and a child. "One of the rights parents have as a result of the natural relation of parent and child is the right to determine whether a relationship with the grandparents, or any other person, is contrary to the child's best interests." *Soergel*, 154 Wis. 2d at 574.

[14]

In attempting to distinguish *Soergel*, the majority notes that the father in *Soergel* voluntarily terminated his parental rights whereas the father in this case died. True, but the *Soergel* court based its decision on the adoption proceedings, not on the termination proceedings. I find no basis for concluding that the legislature intended that the right of adoptive **[15]** parents to control who visits their child depends on the manner by which the adoption arises. An adoption is an adoption. Likewise, contrary to the majority's assertion, I find no basis for concluding that to allow grandparents rights of visitation under sec. 767.245(4), Stats. 1985-86, the statute at issue in *Soergel*, "would be at odds with the adoption statute's purpose of severing all rights of [the father] and his family to the child," *Soergel*, 154 Wis. 2d at 574, whereas to allow grandparents visitation under sec. 880.155, Stats. 1989-90, the statute at issue in this case, would not be at odds with the adoption statute's purpose of severing all rights of the father and his family. I conclude that the decision in this case is inconsistent with the *Soergel* decision, and I would expressly overrule *Soergel*.

48.92 Effect of adoption. (1) After the order of adoption is entered the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent thereafter exists between the adopted person and the adoptive parents.

(2) After the order of adoption is entered the relationship of parent and child between the adopted person and his birth parents, unless the birth parent is the spouse of the adoptive parent, shall be completely altered and all the rights, duties and other legal consequences of the relationship shall cease to exist.

After this case was argued, the legislature adopted 1991 Wis. Act 191 which addresses visitation rights of certain persons following adoption of a child by a relative or stepparent. The effect of the new legislation on the facts of this case is not, of course, in issue.

The new statute adds the following sentence to sec. 48.92(2), **[16]** the statute governing the effect of an adoption: "Notwithstanding the extinction of all parental rights under this subsection, a court may order reasonable visitation under sec. 48.925." (Sec. 48.92(2) is set forth in the margin at note 2). Furthermore, a court may grant reasonable visitation rights to relatives who have maintained "a relationship similar to a parent-child relationship with a child who has been adopted." In deciding whether to grant visitation rights under the statute, a court must determine whether visitation is in the best interests of the child and whether visitation will undermine the adoptive parents' relationship with the child. Further, the court must determine whether the visitor will act in a manner contrary to the parenting decisions of the adoptive parents.[3]

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[3] 1991 Wis. Acts 191 reads in part:

SECTION 2. 48.925 of the statutes is created to read:

48.925 Visitation rights of certain persons. (1) Upon petition by a relative who has maintained a relationship similar to a parent-child relationship with a child who has been adopted by a stepparent or relative, the court may grant reasonable visitation rights to that person if the petitioner has maintained such a relationship within 2 years prior to the filing of the petition, if the adoptive parent or parents, or, if a birth parent is the spouse of an adoptive parent, the adoptive parent and birth parent, have notice of the hearing and if the court determines all of the following:

(a) That visitation is in the best interest of the child.

(b) That the petitioner will not undermine the adoptive parent's or parents' relationship with the child or, if a birth parent is the spouse of an adoptive parent, the adoptive parent's and birth parent's relationship with the child.

[17]

For the reasons set forth, I concur.

(c) That the petitioner will not act in a manner that is contrary to parenting decisions that are related to the child's physical, emotional, educational or spiritual welfare and that are made by the adoptive parent or parents or, if a birth parent is the spouse of an adoptive parent, by the adoptive parent and birth parent.

(2) whenever possible, in making a determination under sub. (1), the court shall consider the wishes of the adopted child. . . .

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Petitioners,

v.

H.F. and F.F.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

A state, in granting parental powers to an adoptive parent, may retain the right to order grandparent visitation over the objection of that parent if the visitation is in the best interest of the child. Finding that such a reservation of authority violates a fundamental due process right of the adoptive parent would unduly created a new fundamental constitutional right in an area of family law. Domestic relations law is an area that should best be left to the states.

The petitioner has simply failed to allege any constitutional basis sufficient to compel this Court to overturn the grandparent visitation statutes that exist in all fifty states.

The Wisconsin Legislature has a sufficient basis to differentiate between the rights of parents who adopt after a judicial termination of parental rights and the rights of parents who adopt after the death of a natural parent.

ARGUMENT

I. A STATE HAS THE RIGHT TO ORDER GRANDPARENT VISITATION OVER THE OBJECTION OF A NATURAL PARENT AND ADOPTIVE PARENT IF THE VISITATION IS IN THE BEST INTEREST OF THE CHILD.

This case involves the issue of whether a state can order grandparent visitation over the objections of a natural mother and her husband, who had adopted the grandchild. It is not a case testing the limits of the power of married parents to determine who may visit their natural children. Petitioner seeks to characterize it as such, however. The petitioner repeatedly argues that marriage creates certain rights. The petitioner gives citations for this proposition. However, the

cited cases all involve the legal rights of parents to the natural offspring of the marriage. An examination of a state's ability to interfere in such a family relationship is not applicable to the fact situation at hand.

The marriage of the petitioners created no legal rights to the child for the new stepfather. As a stepparent, the husband of the child's natural mother, he had no right to challenge visitation by any party. However, the petitioner claims that "the second marriage of the wife to the adoptive father insures the same fundamental freedoms as any marriage." Brief, page 5. This is incorrect. The marriage creates many rights, including many of the family rights spoken of in petitioner's brief. However, the marriage creates those rights only as to the family unit created by the marriage, which consists of the husband, wife, and the natural offspring that they may jointly create. The mere marriage creates no rights of the husband to the wife's already existing natural child.

Adoption, not marriage, is the process that creates rights to the child for the stepfather. However, adoption is strictly a creature of statute. It did not exist at common law. Estate of Topel, 145 N.W.2d 162, 32 Wis. 2d 223 (1966). Only by virtue of the rights granted by the state can the stepfather adopt the child. Only by adopting the child can the stepfather exercise legal control over the child and seek to control who may visit the child. If only the state can grant the adoptive parent control over the child, it is clear that the state can set limits on the amount of control to be exercised. In this case, the state retained the ability to allow natural grandparents to visit the child over the objections of the adoptive father provided that a court found that such visitation was in the best interest of the child. There is nothing in the reservation of such a right unto the state which violates the adoptive parents' constitutional rights.

The petitioners say that the grant of grandparent visitation violates the fundamental due process rights of the parents. The petitioners are seeking to expand the list of fundamental constitutional rights to include the right of an adoptive parent to decide that grandparents cannot visit their natural grandchild even if such visitation is found by a court to be in the child's best interest. This Court held in Bowers v. Hardwick, 478 U.S. 186, 195, 92 L.Ed.2d 140, 148, 106 S.Ct. 2841, (1986), that "There should be, therefore, great resistance to expand the substantive reach of those clauses, particularly if it requires redefining the category of rights deemed to be fundamental". Just such an extension is argued by the petitioner and, as in Bowers, just such an extension should be rejected by this Court.

The issue of a state's right to allow grandparent visitation with the natural grandchild over the wishes of an adoptive father and a natural mother is a family law issue. Ordinarily, state law, not federal law, should determine issues of domestic relations. In re Burrus, 136 U.S. 586, 593-4 (1980), Ankenbrandt v. Richards, 19 L.Ed.2d 441 (1992).

The Wisconsin Supreme Court found that the Legislature acted within its province in deciding that grandparents had a right to seek visitation, if, and only if, it were in the child's best interest. Wisconsin has decided that the best interest of the child may include consideration of the grandparent-child relationship, a relationship honored in all societies, but here reinforced by statute.

II. WHILE STATES DIFFER IN THE SCOPE AND CIRCUMSTANCES OF GRANDPARENT VISITATION, ALL FIFTY STATES HAVE ESTABLISHED JUDICIAL ABILITY TO ORDER VISITATION UNDER CERTAIN CIRCUMSTANCES.

The petitioner provides citations indicating that all fifty states have established statutes allowing grandparent visitation over the objection of parents. The petitioner seeks to have all of these statutes declared unconstitutional yet fails to allege a sufficient, adequate constitutional basis to compel such drastic federal intervention.

III. THE STATE HAS A COMPELLING GOVERNMENT INTEREST IN EFFECTUATING THE BEST INTEREST OF A CHILD AND MAY CREATE DISTINCTIONS BETWEEN THE RIGHTS AFFORDED TO AN ADOPTIVE PARENT OF A CHILD WHOSE NATURAL FATHER HAS DIED AND THE RIGHTS OF AN ADOPTIVE PARENT OF A CHILD WHOSE NATURAL FATHER'S PARENTAL RIGHTS WERE TERMINATED BY JUDICIAL PROCEEDINGS IF THE CREATION OF SUCH A DISTINCTION FOSTERS THE BEST INTEREST OF THE CHILD.

In the opinion below, the Wisconsin Supreme Court carefully analyzed the Wisconsin Legislature's intent relative to the respective authority of parents who adopt after judicial termination of a natural parent's rights and those who adopt after the death of a natural parent. Supp. App., pages 4-8. The Court found a legislative intent to permanently and completely sever ties between a child and the natural parent if the natural parent's rights had been terminated by judicial decree. No such intent to permanently sever the relationship between the child and the birth parent or the birth parent's family was found in the instance of the death of the natural parent.

The policy reasons for the disparity in legislative intent are obvious. Parental rights are only terminated by judicial decree if it is found that the continuance of the

relationship between the parent and the child is harmful. By definition, if a child is adopted after a termination of parental rights, a court has already decreed that it is in the best interest of the child to permanently sever the relationship with the parent. In a death case, no such finding has been made. Rather, prior to the natural parent's death, a presumptively beneficial relationship existed between the parent and the child. The death of the parent should not sever the court's authority to perpetuate a beneficial relationship between the child and the dead parent's family.

CONCLUSION

For the reasons and authorities cited, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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